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NO. 86-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JOSE RAMON GONZALEZ, INDIVIDUALLY AND AS PRESIDENT OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO; JUAN AGOSTO ALICEA, FRANCISCO DE JESUS TORO, ANTONIO J. COLORADO, RUBEN VELEZ LEBRON, GILDO MASSO, EDUARDO ROVIRA AND DIEGO SUAREZ, EACH INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF DIRECTORS OF THE GOVERNMENT DEVELOPMENT BANK FOR PUERTO RICO,

Petitioners,

v.

ZAIDA LYDIA DE CHOUDENS,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED

May *Branti* v. *Finkel*'s reformulation of the standard of *Elrod* v. *Burns* be interpreted to afford First Amendment protection in employment to an indubitably top policymaking and confidential public official like the Senior Vice President, Area of Finance of the Government Development Bank for Puerto Rico, an agency which acts as the leader of economic growth and development, fiscal agent and financial advisor to the Commonwealth government, solely because her duties, while affecting public policy, involve professional and technical matters of agency administration?

PARTIES* TO THE PROCEEDINGS BELOW.

The respondent herein and the conjugal partnership of Zaida Lydia de Choudens and Miguel A. Marrero were the plaintiffs before the District Court for the District of Puerto Rico and plaintiffs-appellees before the Court of Appeals for the First Circuit. Respondent is the party in interest as to the relief afforded below. Besides the petitioners, there were two other defendants before the District Court, who were defendants-appellants before the Court of Appeals: José Ramón Oyola, the previous President of the Government Development Bank for Puerto Rico, and Manuel García Méndez, a former member of its Board of Directors. Since they were replaced, respectively, by petitioners José Ramón González and Gildo Massó, they are not affected by the preliminary injunction granted by the District Court and affirmed by the Court of Appeals, although they remain as defendants below for purposes of plaintiffs' untried claim for damages.

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* Petitioner, the Government Development Bank for Puerto Rico, has no parent companies, subsidiaries or affiliates that must be listed under Rule 28.1 of the Rules of this Court. Nevertheless, it states that it is a public corporation of the Commonwealth of Puerto Rico created by Act No. 17 of September 23, 1948, 7 L.P.R.A. Sec. 551 et seq.; that it has six wholly-owned subsidiaries created by Resolution of its Board of Directors, to wit, the Puerto Rico Development Fund, the Puerto Rico Housing Finance Corporation, the Puerto Rico Higher Education Assistance Corporation, the Puerto Rico Student Loan Association, the Puerto Rico Development Bank Fund and the Puerto Rico Public Finance Corporation; and two affiliates created by statute: the Industrial, Medical and Environmental Pollution Control Facilities Financing Authority and the Municipal Finance Agency.

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 801 F.2d 5 (1st Cir. 1986), and appears reprinted in Appendix B. The opinion of the District Court, not yet reported, appears reprinted in Appendix C.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 19, 1986, as it appears from Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peacefully to assemble ...".

The First Amendment applies to the Commonwealth of Puerto Rico through either the Fifth or the Fourteenth Amendments.

STATEMENT OF THE CASE.

The issue in this case is whether a top-ranking government official like respondent, found by both Courts below to be a substantial policymaker, whose job also involves the reposing of confidence to the highest degree and "communicating" or spokesperson duties, may successfully challenge on First Amendment grounds her demotion and simultaneous reinstatement to a tenured position, alleged to be politically motivated.

Respondent occupied the position of Senior Vice President and Director of the Area of Finance of the Government Development Bank for Puerto Rico (the Bank) for most of an 8-year administration of the New Progressive Party. The Popular Democratic Party administration elected in November of 1984 transferred her to a lesser position within the Bank on April of 1985. Claiming that such action was due solely to her political affiliation, she brought an action before the District Court for Puerto Rico under 42 U.S.C. 1983 seeking reinstatement and damages from the Bank, its President, and the members of its Board of Directors.

Although it is undisputed that respondent's policymaking, confidential and "communicating" or spokesperson duties are related to the exclusively governmental purposes and goals of the Bank, the District Court granted respondent's request for a preliminary injunction reinstating her to her critically influential position. The District Court interpreted this Court's reformulation in *Branti* v. *Finkel*, 445 U.S.

507 (1980), of its earlier ruling in *Elrod* v. *Burns*, 427 U.S. 347 (1976), in a way that would afford First Amendment protection in employment even to top government policymakers and participants in confidence whose duties, like respondent's, significantly affect public policy. According to the Court, after *Branti* it was not enough for an official to be substantially involved with government public policy since this Court had required an excepted official to be also involved with "partisan political interests or concerns".

The Court of Appeals affirmed that decision and upheld and more amply articulated the District Court's views on the *Elrod-Branti* doctrine. In opinions delivered the same day in this and a companion case, *Jiménez-Fuentes* v. *Torres-Gaztambide*, No. 85-1655, slip op. (1st Cir. September 19, 1986), the Court announced an interpretation of the *Elrod-Branti* doctrine that extends constitutional protection in employment to public officials whose duties involve matters of agency administration, characterized as "technical" and "professional", even if they are found to be, like respondent, substantial government policymakers, participants in confidence and "communicators". This view is not shared by any other Court of Appeals, none of which has ever found a government official of respondent's rank and influence in a government agency's affairs to be protected from politically motivated adverse employment action, nor required, in order for such protection to be unavailable, that the official's duties go beyond substantial participation in the formulation or implementation of government public policy or in confidential matters related thereto. Petitioners contend that few cases could demonstrate as plainly as this one does why the First Circuit's interpretation of the *Elrod-Branti* doctrine must be rejected.

A. The Government Development Bank for Puerto Rico

Respondent was one of three Senior Vice Presidents of the Government Development Bank for Puerto Rico, an institution vital to the Commonwealth. Both Courts below "scrutinized" the Bank to determine its role in the government. From both Courts' findings, see Appendix ("App.") A6-A7, A24-A25; the Bank's enabling statute, Act No. 17 of September 23, 1948, 7 L.P.R.A. 551 et seq.; and the Bank's 1984 Annual Report, an exhibit on which both Courts relied,

the following picture of the Bank may be obtained.

As of 1984, it had nearly $4 billion of assets, year-end capital of $249 million and some 300 employees. Its purpose is to aid the government of the Commonwealth of Puerto Rico in the performance of its fiscal duties and in carrying out its governmental responsibilities to develop the economy of Puerto Rico, particularly with respect to its industrialization. The Bank has three primary functions: (1) fiscal agent and financial advisor to the Commonwealth government, its agencies, municipalities and public corporations, and financial advisor to the Governor of Puerto Rico; (2) lender to government and private industry; and (3) depository and trustee of Commonwealth government funds.

In its role as fiscal agent, the Bank's approval is necessary for all government borrowing; it oversees the borrowing for capital improvements programs and arranges financings for other requirements such as working capital; and handles all sales of all notes, bonds and other government obligations in the capital markets. As financial advisor the Bank participates in all government fiscal matters, including the elaboration of fiscal and financial policies at all government levels. The Bank also makes direct loans to public corporations and municipalities and also grants direct financing for economic development purposes to the private sector. The Bank is the principal depository for the funds of the Commonwealth government and its agencies. It handles, under the direct supervision of the position previously occupied by respondent, the current account of the Department of the Treasury and other government entities, establishing policies designed to maximize the use of governmental funds. Finally, through its subsidiaries and affiliates, the Bank has a vital role in the private financing of various production sectors of the economy.

In short, the Bank's functions are critical in the planning and implementation of all government financial and economic policies and in the development of private industry. The Court of Appeals in fact described the Bank's objectives as "legitimate partisan goals for government operations". App. A7.

B. Respondent's Position and Duties Within the Bank

As Senior Vice President in charge of the Area of Finance of the Bank, a "confidential position" under Commonwealth law[1], respondent headed "one of the Bank's three main operation areas ... the other two ... being the Investment, Treasury and Public Financing Area and the Private Financing Area." Court of Appeals' Opinion, App. A8, and see App. H, Organization Chart of the Bank. As determined by the District Court, whose findings regarding respondent's position were found by the Court of Appeals to be "amply supported", App. A8, respondent's was a high level, policymaking and confidential position where she enjoyed "broad discretion to implement and discharge her duties and ... provide[d] valuable advice to higher bank officials." App. A26. Respondent herself admitted at trial that this advice included Bank matters outside her area. In fact, the position's official description requires "participat[ion] in the formulation and development of the lending policies" of the Bank.

Among other critical functions within the Bank, the District Court expressly concluded that the respondent, as Head of the Area of Finance, "was in charge of planning, coordinating, directing and supervising" the operations of the Area of Finance; "gave advice to the President and the Board of Directors on financial matters within

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[1] Under the Civil Service Act, No. 5 of October 14, 1975, 3 L.P.R.A. 1301 et seq., the purpose of the confidential service is identical to the *Elrod-Branti* exception's: "[t]o assure that the government has adequate means ... to implement the public policy validated by the majority ...". 3 L.P.R.A. 1312(5). It includes those who intervene or collaborate substantially in the formulation of public policy or directly serve or advise the head of the agency. They may not acquire tenure and are freely selected and removed, but a confidential employee who has previously held a career position is entitled to reinstatement in a position equal or similar to his last career position, if removed from the confidential position. 3 L.P.R.A 1350, reprinted in App. F. Confidential employees are generally limited to 25 per agency, 3 L.P.R.A. 1351, reprinted in App. F, and must comply with the statutory requirements to qualify as such. *Colón* v. *Municipality of Ceiba*, 112 D.P.R. 740 (1982). The Bank is not subject directly to the statute, see 3 L.P.R.A. 1338, but to adopt regulations embodying the merit principle. *Id*. Its regulations for confidential positions, reprinted in App. G, closely follow the statutory directives.

Career employees, who are selected strictly on merit and can only be removed for cause, Court of Appeals' Opinion, App. A49, comprise the immense majority of public employees in the Commonwealth.

her area"; "is also a member of the Loan Committee of the Bank"; "may act as interim President"; "acts as advisor on accounting matters to government agencies"; "maintains and updates all the Bank's internal systems and procedures to ensure that there are adequate internal controls"; "examines all of the Bank's proposed disbursements to ensure that they are made in accordance with the approving authority"; "prepares and monitors the Bank's annual budget"; "monitors the payment of the central government['s] ... public debt and maintains accounting records for the central government's sinking fund"; "maintains accounting records of ... loans and prepares monthly and annual statements"; supervises all "data processing activities which include three divisions responsible for all the computerized data services"; "is in charge of the Secretary of the Treasury['s] ... account and the payment of all central government checks issued by the department and other agencies ... [also] serving all government accounts". App. A24-A25. In sum, the Court had "no quarrel" that respondent "is a policymaker and has access to confidential information within the bank." App. A26.

The Court of Appeals, too, acknowledged that respondent was "a top policymaking official in a public agency," App. A10, and that her "responsibilities signify a position of substance, of valued policy contributions, recommendations, and advice," App. A9.

C. The District Court's Decision

Nevertheless, the District Court rejected the position that public offices with policymaking and confidential duties connected to government public policy are offices for which political affiliation is an appropriate requirement. Instead, the Court considered the primary question under *Branti* to be "whether the policymaking and access to confidential information by the particular employee was related to *partisan political interests*, not to public policy ...". App. A26 (emphasis in the original). The Court thus interpreted *Branti*'s reformulation of the standard of *Elrod* that a public employee is excepted from First Amendment protection from politically motivated dismissal if "party affiliation is an appropriate requirement for the effective performance of the public office involved", *Branti*, supra, at 518, as requiring from the position in question more than an effective participation in the government's policymaking, policy implementation or

confidential processes.

This view of the standard is based on a literal construction of two phrases used by this Court in *Branti*, where after having announced and explained the reformulation of the *Elrod-Branti* exception, it stated that the functions of the plaintiffs there, two Assistant Public Defenders, involved no policymaking related to "partisan political interests" nor confidential information having a bearing on "partisan political concerns", 445 U.S., at 519, because their duties as public employees were related to the needs of their individual clients, as distinguished from the needs and the goals of the government as such. According to the District Court's interpretation of *Branti*, then, "partisan political interests or concerns" must be the subject of the duties of any office for which "party affiliation is an appropriate requirement." The Court did not define what "partisan political interests or concerns" means in this context.

D. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's Order granting respondent's request for a preliminary injunction.[2] In this and a companion case, *Jiménez-Fuentes* v. *Torres-Gaztambide*, No. 85-

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[2] Since the decision below "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2177 (1986). "With a full record before it" on legal issues, this Court is "justified in proceeding to plenary review", because limited review in a case of this kind "is a rule of orderly judicial administration, not a limit on judicial power". *Id.*

Here, a "full record" was developed below on the legal issues decided by the Court of Appeals. "Extensive evidence, testimonial and documentary, was presented by both parties and post-hearing briefs were simultaneously filed" before the District Court. App. A13. The Court of Appeals reviewed a transcript of a four-day trial and an appendix of all relevant documentary evidence. No substantial additional facts "are likely to emerge at trial". See *Thornburgh*, supra, at 2177, n. 8. The fact that relief is sought from the entry of a preliminary injunction is therefore no bar to review. "[R]eview of interlocutory appeals was designed not only to permit the defendant to obtain immediate relief but also in certain cases to save the parties the expense of further litigation." *Id.*, at 2176, paraphrasing *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897).

1655, slip op. (1st Cir. September 19, 1986), reprinted in App. E, the Court adopted an interpretation of the *Elrod-Branti* standard that requires that a given position be related to "partisan political interests or concerns" to be excepted from First Amendment protection under that doctrine. According to the Court the *Branti* test that "party affiliation is an appropriate requirement for the effective performance of the public office involved" requires that the duties of a particular position be directly related to "partisan political interests or concerns", in that "a sufficient nexus [must exist] between the position at issue and the kind of policy relating to partisan concerns". App. A10.

The Court adopted a two-step analysis to determine whether, according to its particular interpretation of the *Elrod-Branti* doctrine, a given position is excepted from First Amendment protection thereunder. First, "[a] threshold inquiry, which derives from *Branti*, involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to 'partisan political interests ... [or] concerns.' 445 U.S., at 519." App. A40. "If this first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other officeholder whose function is such that party affiliation is an equally appropriate requirement."[3] *Id.*

In this case, although concluding that the Bank had "legitimate partisan goals for government operations", App. A7, and that respondent's position was "indubitably ... policymaking, confidential and communicative", *Id.*, with responsibilities that "signify a position of substance, of valued policy contributions, recommendations and advice", App. A9, the Court failed to connect the position with "the kind of policy relating to partisan concerns." App. A10. While recognizing "the closeness of a case involving the political firing of a top policymaking official in a public agency", *Id.*, the Court nevertheless held that party affiliation was not an appropriate requirement for respondent's position, because her duties involved "technical and

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[3] Actually, the Court's analysis involves three steps: determining whether the government agency pursues partisan goals, see App. A6-A7, A42-A44; whether the position involved has policymaking, confidential or spokesperson duties; and, if so, whether the position has duties bearing on the agency's partisan goals. App. A7-A9.

professional matters" of agency administration which it characterized as "politically neutral". App. A9.

REASONS FOR GRANTING THE WRIT.

This Court made clear in *Elrod* v. *Burns*, 427 U.S. 347 (1976), that an important exception must exist to the general rule that public employees may not be dismissed solely for their political beliefs. Representative government requires, in order to be effective, that a newly elected administration be able to substitute, even on political affiliation grounds, those employees that are in a position to "obstruct [ ] the implementation of policies of the new administration". 427 U.S., at 367. Since policymaking individuals are in a position to "thwart the goals of the in-party", *id.*, this Court agreed that dismissal of such individuals was constitutionally permissible in order to achieve the vital governmental end of allowing representative government to work.

Branti v. *Finkel*, 445 U.S. 507 (1980), later clarified that merely labeling an official as "policymaking" or "confidential" is insufficient to except him from constitutional protection. Attention must be paid to the actual nature of the official's duties to make sure that political affiliation is truly relevant to a particular position. But, as the Seventh Circuit has decided, "[a] narrow definition of who is a policymaker" for purposes of the *Elrod-Branti* doctrine "necessarily increases the chances of 'undercut[ting] ... the implementation of the policies of the new administration, policies presumably sanctioned by the electorate'. *Elrod*, 427 U.S., at 367, 96 S.Ct., at 2687." *Nekolny* v. *Painter*, 653 F.2d 1164, 1169-1170 (7th Cir. 1981), cert. denied 455 U.S. 1021 (1982), and an unduly restrictive interpretation of the exception necessarily destroys its purpose.

The First Circuit's interpretation of the exception, contrary to the Seventh Circuit's, significantly restricts its scope, completely frustrates its purpose and enormously curtails the "ability of the government to implement the will of the people [that] is fundamental to our system of representative democracy." *Nekolny*, 653 F.2d, at 1170. That interpretation, which presumes that high-ranking public officials like respondent may not "thwart the goals" of a new administration if

their duties in agency administration involve what the Court characterized as "technical and professional" matters, is contrary *not only to* the meaning of this Court's decisions but to reality and should not be allowed to stand by this Court.

I. The Court of Appeals for the First Circuit erroneously interpreted the *Elrod-Branti* doctrine, severely restricting and undermining the exception to First Amendment protection recognized by this Court in those decisions.

In *Elrod*, this Court concluded that political patronage dismissals of public employees violate First Amendment rights of political belief and association. Five Justices agreed on the common ground of *Perry* v. *Sindermann*, 408 U.S. 593 (1972)[4] that conditioning public employment on the support of a particular political view violated the First Amendment.

This Court recognized, however, that "the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons." 427 U.S., at 360 (plurality opinion). Employees engaged in policymaking or confidential positions are not entitled to protection and may constitutionally be dismissed for political reasons. The rationale found to justify this exception is that the state has a "paramount" interest, "one of vital importance", *Id.*, at 362, in "...the need for political loyalty of employees ... to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate", and this interest overrides the First Amendment rights of policymaking employees. *Id.*, at 367. The same reasoning applies to confidential employees which, according to the concurring opinion, are also excluded from protection. *Id.*, at 375. This Court warned, nevertheless, that "care must be taken not to confuse the interest of

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[4] "... Mr. Justice Brennan ... stated that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry* v. *Sindermann* ...". *Branti* v. *Finkel*, 445 U.S. 507, 514 (1980). "Mr. Justice Stewart's opinion ... expressly relied on the same passage from *Perry* v. *Sindermann*" quoted in the plurality opinion. *Id.*, at 516.

partisan organizations with governmental interests. Only the latter will suffice." *Id.*, at 362.

In *Branti* v. *Finkel* this Court restated the test set forth in *Elrod* for determining whether a public employee is entitled to protection. The Court indicated that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S., at 518. This standard, while refusing to adscribe talismanic virtues to labels, does not represent an abandonment of *Elrod*'s nonpolicymaking, nonconfidential test.[5] *Branti*'s analysis in fact relied and its conclusion depended on the extent to which the position of Assistant Public Defender did not involve policymaking and confidentiality connected to government public policy.[6] No alternative standards for determin-

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[5] Nothing in *Branti* indicates an intention to substantially alter the rules set down in *Elrod*. This Court made it clear that it was the holding of *Elrod* that was being applied. *Branti*, 445 U.S. 512, n. 6 ("Unlike Mr. Justice Powell in dissent ... petitioners do not ask us to reconsider the holding in *Elrod*"). Moreover, the question presented by *Branti* was carefully framed to address only the particular office of the respondents, 445 U.S., at 508, and this Court expressly refused to make pronouncements on other matters either raised by the parties, *Id.*, at 513, n. 7 (refusing to consider an argument by petitioners "[i]n light of the limited nature of the question presented"), or by analogy of other positions to that of the respondents, *Id.*, at 519, n. 13 (refusing to express an opinion on whether a deputy prosecutor can be dismissed on grounds of political party affiliation).

[6] This Court relied in the District Court's findings about the duties of the officials involved. These show that they were not governmental policymakers according to *Elrod*'s criteria: "... respondents had 'very limited, if any, responsibility' with respect to the overall operation of the public defender's office [,] ... did not 'act as advisors or formulate plans for the implementation of the broad goals of the office' and, although they made decisions in the context of specific cases, 'they do not make decisions about the orientation and operation of the office in which they work'[, and] ... the only confidential information to which they had access was the product of their attorney-client relationship with the office's clients; to the extent that such information was shared with the public defender, it did not relate to the formulation of office policy." 445 U.S., at 511.

Since the exception covers only those "policymakers ... who formulate governmental policy; ... It does not appear that the *Branti* opinion gave direct

ing when political affiliation might be an 'appropriate requirement' for public employment under the reformulated test were announced, either. As a result, the distinctions between *Branti* and *Elrod* have been widely considered more aclaratory than substantive.[7]

Nonetheless, *Branti* rejected the notion that the *Elrod* exception should be applied to *all* policymaking and confidential positions, without regard to the activity or the matters to which such policymaking and confidentiality relate, since "party affiliation is not necessarily relevant to every policymaking or confidential position". *Id.* Instead, *Branti* requires a careful examination of the nature of the functions of the position at issue to determine not only if they involve policymaking, confidential or spokesperson responsibilities, but also if their subject matter implicates the kind of activity for which party

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consideration to the issue as it affects true governmental policymakers, no doubt because the issue was not raised by the facts of that case." *Garretto* v. *Cooperman*, 510 F.Supp. 816, 820 (S.D.N.Y. 1981).

[7] Noting in *Branti* that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered", 445 U.S., at 518, this Court referred, as raising the same issue, to that passage in *Elrod* where Justice Brennan explains that "[no] clear line can be drawn between policymaking and nonpolicymaking positions". 427 U.S., at 367. This equivalence between positions that may require a particular political affiliation and true government policymaking positions is fully consistent with *Branti*'s rejection of the practice of *labeling* positions as policymaking that actually are not.

On the government policymaking-appropriate requirement equation, post *Branti*, see : *Meeks* v. *Grimes*, 779 F.2d 417, 420 (7th Cir. 1985) ("Policymaking type positions ... are invariably offices for which political affiliation is a legitimate job criterion"); *Grossart* v. *Dinaso*, 758 F. 2d 1221, 1226 (7th Cir. 1985) ("Elected officials must be able to rely on the political loyalty and compatibility of a policymaking civil servant in order to ... realize their electoral mandate"); *Awtry* v. *U.S.*, 684 F.2d 896, 902 (C.Cl. 1982) ("We were aware of *Branti* ... but quoted at length the 'policymaking' language of *Elrod*, thus showing we did not then consider anything in *Elrod* to have been overruled or modified by *Branti* ... That is still our opinion."); *Garretto* v. *Cooperman*, 510 F.Supp. 816, 819 (S.D.N.Y. 1981) (Holding that *Branti* standard was dictum). Other decisions, while citing *Branti*, have applied the policymaking analysis of *Elrod*: see *Nekolny* v. *Painter*, 653 F.2d 1164, 1169 (7th Cir. 1981) (Court persuaded that jury could reasonably find that plaintiff was within the "policymaking exception"); *Ness* v. *Marshall*, 660 F.2d 517, 521 (3rd Cir. 1981) (City solicitors involved in policy considerations beyond narrow legal issues).

affiliation is a relevant and legitimate consideration. This process involves above all a common sense judgment on the totality of the circumstances surrounding the position to ascertain if it may be considered political. Thus, this Court explained that although a state university football coach formulates policy, "no one could seriously claim that Republicans make better coaches than Democrats". *Id.* Football's connection to politics and representative government is certainly far removed. Similarly, although Assistant Public Defenders like the *Branti* plaintiffs could make policy and receive confidential information in connection with their clients' cases, their primary responsibility of representing individuals in controversy with the state made political affiliation not relevant to their position. But, on the other hand, for the duties of a position related to true government activity, an essential part of the political process, like assisting an elected official to communicate with the public, the press and other elected officials, political affiliation is generally relevant, and becomes the basis for the *Elrod-Branti* exception to First Amendment protection in government employment. *Id.*

This considered judgment as to specific positions is a necessary consequence of the purpose for which the exception exists, that is, to advance the vital government interest of preventing the implementation by the government of the policies of a new administration from being obstructed by officials affiliated to a different party. *Elrod*, 427 U.S., at 367. Since there may be positions in the government that may be labeled as "policymaking" and "confidential" and yet do not affect the formulation or implementation of true government public policy, which is always political, but the "needs of individual clients", as happened with the Assistant Public Defenders in *Branti*, 445 U.S., at 519, this Court made it clear there that not every policymaking and confidential position is excepted from the general rule: only those for which "party affiliation is an appropriate requirement for the effective performance of the public office involved", *Id.*, at 518, because they may affect significantly the formulation and implementation of the public policy or government programs of a new administration, are excepted.

Because this Court did not expressly state the "particular factors which indicate that a position falls within the *Branti* test", *Brown* v. *Trench*, 787 F.2d 167, 169 (3rd Cir. 1986), lower courts had to

formulate working rules incorporating their views on *Branti*'s effect on *Elrod*. The Court of Appeals for the First Circuit had not faced that task until now.[8] In this and its companion case, *Jiménez-Fuentes* v. *Torres-Gaztambide*, the District Court had granted preliminary injunctions requiring the reinstatement of the plaintiffs to their positions. After vacating a panel decision in *Jiménez-Fuentes*, the Court decided to hear argument in both cases. Its decisions correctly acknowledge that *Branti* departed from the use of labels alone to determine if a policymaking or confidential position is within the *Elrod-Branti* exception. *Jiménez-Fuentes*, App. A37. They also recognize the reformulation of the test to be "'whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved', 445 U.S., at 518." App. A38.

However, the Court attributed a literal and decisive significance to this Court's remarks that the duties of the *Branti* plaintiffs did "not relate to partisan political interests [or concerns]", 445 U.S., at 519, and adopted on that basis a restrictive interpretation of the reformulated standard that has no justification in either *Elrod* or *Branti*. The "threshold inquiry" of a multiple-step analysis it adopted, see p. 8 and note 3, supra, "involves examining whether the position at issue, no matter how policy-influencing or confidential it may be relates to 'partisan political interests ... [or concerns]'". App. A40. In *Jiménez-Fuentes*, the Court concluded that the plaintiffs, Regional

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[8] After the change of administration in Puerto Rico following the general elections of November 1984, more than 200 cases were filed in the District Court by employees of Commonwealth agencies claiming to be protected under the *Elrod-Branti* doctrine. See Appendix B, Certification of the Clerk of the Court, in *Rosario Nevares* v. *Torres Gaztambide*, 633 F.Supp. 287, 303 (D.P.R. 1986). Many involve the top hierarchy of cabinet departments and public corporations. A suit by the Secretary of State and of Labor of the previous administration, who was terminated by the new Governor as a member of the Board of Directors of the Bank was dismissed, but found to have "required close judicial scrutiny". See *Quirós* v. *Hernández Colón*, 800 F.2d 1, 2 (1st Cir. 1986). Pending cases include an Undersecretary of Education, two Assistant Secretaries of Agriculture, an Assistant Secretary of Justice, the Deputy Executive Director of the Puerto Rico Aqueducts and Sewers Authority, the General Counsel of the Puerto Rico Telephone Company, and the Senior Vice President, Private Financing and the Vice President, Administration of the Bank.

Directors of a public housing corporation, satisfied the requirements of this restrictive inquiry because they were "proconsuls for their agency within their region, representing the agency in all respects. Each region was a microcosm of the larger agency, and the duties of each regional director were representative of the duties of the agency's executive director." Court of Appeals' Opinion, App. A7. In respondent's case, however, the Court found that "[b]ecause her division is not a microcosm of the larger agency, it is insufficient to show that she is a policymaker for a bank that involves partisan political concerns." App. A7-A8. Although her "responsibilities signify a position of substance, of valued policy contributions, recommendations, and advice", App. A9, and this made her "a top policymaking official in a public agency", App. A10, the Court found that the agency administration responsibilities of the area of the Bank which she headed involved "technical and professional matters" which the Court characterized as "politically-neutral" and as not requiring the incumbent to share the political affiliation of the agency head. App. A9.

The First Circuit's restrictive interpretation of the *Elrod-Branti* exception must be rejected by this Court. It effectively establishes an "exception to the exception", an erroneous and unjustified substandard meant to be applicable to true government policymakers involved in what the Court describes as "technical and professional matters", actually crucial aspects of agency administration. It carves out from the *Elrod-Branti* exception and unduly affords constitutional protection in their jobs to a substantial number of influential public officials that may "undercut [representative government] by tactics obstructing the implementation of policies of the new administration." *Elrod*, 427 U.S., at 367. Further, it is based on the premise that *Branti*'s remarks about "partisan political interests or concerns" were meant to be interpreted literally and not as implicating true government public policy.

The Court's views on the kind of positions that may influence the processes of government, public policymaking and its implementation, which are indissolubly tied to political goals, are unwarranted. Officials elected by the people to implement their political programs, and those that they appoint to define, limit or develop broad general goals or implement them do not operate in a vacuum, unassisted and unsupported by others who might possibly not define or implement

themselves those goals, but who are nevertheless indispensable for the primary political leadership of an agency to be effective. All government agencies invariably need positions that, although not calling for the actual definition, development or implementation of political, or public policy, goals, are nevertheless essential to the policymaking process because they require a substantial amount of input into public policy decisions made or implemented by others.

Positions entrusted with the broad and fundamental responsibility for an agency's administration, for example, are essential to policymaking and policy implementation. They normally encompass the entire administrative apparatus of the agency, namely the finance, budget, accounting, controllership, data processing, personnel and general services and managerial functions of the agency. Officials in charge of these functions may, although in some cases not defining themselves political goals and objectives, also "make the difference between the acclaimed success of a government agency or program and its failure or, more typically, its lackluster performance." App. A40. The difference between a policymaker's or policy implementor's effectiveness or failure is more often than not dependent on the enthusiasm and initiative of these generally powerful officials. Foot-dragging in these areas makes effective policymaking or implementation as to strategic goals from difficult to impossible.

Respondent's own position in particular indeed implicates the kind of policymaking and implementation associated with ultimate public policy-political goal fixing. The duties that both Courts below attributed to her position require this conclusion. Among others, she "contribut[ed] to investment strategy", App. A9, "gave advice to the President and the Board of Directors on financial matters within her area", "act[ed] as advisor on accounting matters to government agencies", and "act[ed] as interim President" of the Bank. App. A24-A25. The power to act as President of the Bank in itself is enough to except her from constitutional protection in employment. An official whose job involves substitution for the head of the agency may unquestionably be required to share his political affiliation. But, although the Court adopted the view in *Jiménez-Fuentes*, App. A41, that what matters are "'the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office'", see *Tomczak* v. *City of Chicago*, 765 F.2d 633, 640 (7th Cir.

1985); *Ness* v. *Marshall*, 660 F.2d 517, 522 (3rd Cir. 1981), in respondent's case it trivialized the occasions shown by the record in which respondent in fact acted as President of the Bank. Finally, the official description of respondent's position expressly requires "participat[ion] in the formulation and development of the lending policies" of the Bank, and respondent herself admitted at trial that her advice to the President and the Board of Directors included bank matters outside her area. But even discounting this participation in the fixing of ultimate goals, it seems evident that the control of the accounting, budgeting, data processing, disbursements and internal systems and procedures of the Bank has a decisive influence in the formulation and achievement of the Bank's governmental endeavors responsive to public policy.[9]

To arrive at considered decisions on government borrowing, for example, be it for capital improvements or other requirements such as working capital, and to advise the central government, the public corporations and the municipalities as to fiscal and financial policies, the President and the Board of Directors of the Bank rely by necessity on the accuracy and relevancy of all the financial and accounting data and information monitored, collected, organized, controlled and provided by respondent's subordinates. Ideologically oriented screening and selection of the data provided to the policymakers may decisively tilt the balance towards a particular approach or decision. Information withheld from the policymakers may affect the process in another direction.[10] Control of the budget, essentially an exercise in

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[9] Since "[p]olicymaking or policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed", *Nekolny* v. *Painter*, 653 F.2d, at 1170, it is not necessary for a position to be excepted from the general rule of employment protection that its occupant have the final decision as to public policy. *Tomczak* v. *City of Chicago*, 765 F.2d, at 642.

[10] In fact, there is no stage in the public policy process to which accurate and relevant information is not fundamental. It is essential from the initial phase, including problem recognition, which is "a function of both the information received and one's ability to interpret it," see G.D. Brewer and P. de León, *The Foundation of Policy Analysis*, The Dorsey Press, 1983, p. 33; during the vital phase of selection or decision on alternatives, *id.*, at 200-203; and up to its conclusion. It is unquestionable that "virtually no information is neutral; almost all information will have already been

priorities, affects the means and the ability of the different operational areas of the Bank to achieve their objectives. Stronger support for investment, for example, may result in a decline in the politically-sensitive industrial development promotions. Control of disbursements similarly may affect the performance of the Bank's obligations to the government and the public or the flow of outside services essential to the Bank and its policymakers for their work.

In sum, respondent's responsibilities, like "the power to make rules and recommend reorganization, the oversight of accounting policy, a contribution to investment strategy, budget and personnel recommendations, and software advice ... signify a position of substance, of valued policy contributions, recommendations and advice", Court of Appeals' Opinion, App. A9. Even if they could be correctly characterized as "technical and professional" they have the immediate potential of obstructing the formulation, development and implementation of politically-sensitive government objectives. Policymaking and implementation involve choices including ideological and technical components indissolubly tied to each other. As the President of the Bank testified, respondent's "Finance Area was the most important of the Bank's three areas for the 'internal work' of the Bank to ensure 'the proper flow of work'". Court of Appeals' Opinion, App. A9-A10. As found by the District Court, respondent's area provides the necessary services and information "to give other areas of the bank the necessary input to make their decisions." District Court's Opinion, App. A28.

These considerations about respondent's position and its potential ability to hinder or ensure the success of the agency's policies are equally applicable to equivalent positions existing in all federal, state and local government agencies throughout the United States. The political affiliation of the persons occupying these positions "could affect the ability of a new administration to implement new policies", *Tomczak*, 765 F.2d, at 642, to possibly the same extent as that of the officials that themselves define and implement politically-responsive public policy and government objectives, because the latter may not be effective without the support of the former. The decision of the Court of Appeals in this case, however, would prevent agency heads

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processed, interpreted and evaluated according to sets of objectives that are not guaranteed to jibe with (the decisionmakers' objectives)". *Id.*, at 201.

from taking into consideration the political affiliation of the incumbents of such positions in the crucial decisionmaking process of their selection or retention.[11]

Finally, the meaning of this Court's reference in *Branti* to partisan political interests and concerns must be found in the general context of *Branti*'s restatement of the *Elrod* holding. What is fundamental in *Branti* is its clarification that not all policymaking or confidential positions are excepted from First Amendment protection. Only those for which political affiliation is relevant, which touch "partisan political interests or concerns", are excepted.

To determine what "partisan political interests" and "partisan political concerns" are we must first answer the more general question of what political parties and politicians as such are interested in, or concerned with, generally speaking. Quite obviously, on the one hand, they are concerned with party organization, fund raising, planning campaign strategy and other strictly partisan matters. But these interests or concerns pertaining exclusively to partisan organizations may not constitutionally be the basis for patronage dismissals. *Elrod*, 417 U.S., at 362. However, political parties and politicians are also principally concerned with public policy. Each election year they present to the electorate a political program which is partisan in the sense that it represents the goals and views of a particular party concerning government and its administration. When that party is elected, its partisan goals and views become the goals and views of the government, that is government or public policy, and those called to define more precisely and to implement those goals are, in that certain sense, formulating and implementing partisan goals.

It is in this sense, therefore, that partisan interests or concerns and party affiliation are relevant to policymaking and confidentiality in the performance of a particular government position: to the extent that a government official is directly or indirectly involved in the formulation or implementation of government public policy, as is respondent,

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[11] This Court has warned that insubstantial law suits against high level government officials must be discouraged. *Mitchell* v. *Forsyth*, 472 U.S. , 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985). A narrow reading of the *Elrod-Branti* exception like the First Circuit's promotes such litigation, not by employees placed in the lower end of the spectrum, but by substantial policymakers, as shown by the experience in Puerto Rico. See note 8, supra.

his position is related to "partisan political interest or concerns" and must be considered excepted from protection under the First Amendment. Under the *Elrod-Branti* test correctly interpreted, respondent is unquestionably excepted from First Amendment protection.

II. Conflicting approaches among Courts of Appeals and District Courts and the general confusion surrounding the interpretation of the *Elrod-Branti* doctrine require clarification by this Court.

The importance of clear guidelines in this critical area of constitutional law cannot be gainsaid. The interests implicated are the most cherished individual liberties and the core values of the system of government of the United States. On the one hand are the rights of public employees to political beliefs and association guaranteed by the First Amendment and on the other the need for representative democracy to be effectively governed by those chosen by the people.

This area of conflict recurrently requires informed judgment by elected or appointed officials who must implement new government programs. After each election held, a process opens to select the people that will define and implement the general principles sanctioned by the electorate. Thousands of decisions concerning the appointment or retention of public employees are then required at all levels of federal, state, and local governments. For an adequate balance to exist between the competing interests that each of these decisions entails, the fundamental guidelines must be clear. Unfortunately, confusion reigns throughout federal courts concerning the correct interpretation of the *Elrod-Branti* doctrine, particularly as to the exception it recognizes. This "lack of notice as to the scope of First Amendment protection of public employees hinders elected officials seeking to exercise their legitimate power through the control of personnel". *Ecker* v. *Cohalan*, 542 F.Supp. 896, 901 (E.D.N.Y. 1982).

To begin with, several Courts of Appeals and District Courts have differently interpreted the meaning of the *Elrod-Branti* doctrine. The Seventh Circuit, for example, adopted an interpretation that denies protection to policymaking and confidential positions affecting true government, or public, policy. In *Nekolny* v. *Painter*, 635 F.2d 1164,

1170 (7th Cir. 1981), a case involving a senior citizen programs coordinator in a small township, the Court explained that the test is "whether the position held by the individual authorizes ... meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation". This standard, all but expressly adopted by the Third Circuit also, see *Brown* v. *Trench*, 787 F.2d 167, 169-170 (3rd Cir. 1986) (involving a county assistant director of public information), has been the basis since *Branti* of considerable case law interpreting its doctrine.

Decisions like *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985) (finding the second in command in the agency providing water to a major city excepted); *Soderbeck* v. *Burnett County, Wis.*, 752 F.2d 285 (7th Cir. 1985) (recognizing that a confidential secretary to a small county sheriff would be excepted); *Shakman* v. *Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983) (finding the Superintendent of Employment of the Chicago Park District excepted); *Ness* v. *Marshall*, 660 F.2d 517, 521 (3rd Cir. 1981) (finding city solicitor and assistants excepted: "...as a matter of law, the [policymaking] duties imposed on city solicitors [and their assistants] ... define a position for which party affiliation is an appropriate requirement. In relying on an attorney to perform these functions so intimately related to city policy, the mayor has the right to receive the complete cooperation and loyalty of a trusted adviser..."); *Joyner* v. *Lancaster*, 553 F.Supp. 809 (M.D.N.C. 1982) (captain with advisor and planning role in sheriff's office would be excepted); *Ecker* v. *Cohalan* 542 F.Supp. 896 (E.D.N.Y. 1982) (Deputy Commissioner of Parks statutorily substituting for agency head and charged with patronage appointments excepted), are based on the same standard or substantially the same reasoning of *Nekolny*. The emphasis falls on whether "there is room for principled disagreement in the decisions reached by the employee and his superiors, and ... he has meaningful direct or indirect input into the decisionmaking process", *Tomczak*, 765 F.2d, at 641 (citing *Nekolny*). The test is explicitly tied to government decisionmaking and is clearly met by those officials having substantial input into decisions affecting government public policy. Support for this analysis has been found in the "purpose of the policymaker exception ... to ensure that the First Amendment's protection not interfere with the work of government and the ability of

duly elected officials to implement their policies." *Shakman*, 722 F.2d, at 1310. It is the administrative power of the position and its potential impact in government decisions that make the difference.

In contrast with these views are those of the First Circuit which, as explained above, require "a sufficient nexus ... between the position at issue and the kind of policy relating to partisan concerns", App. A10, for the *Elrod-Branti* exception to apply. Under this interpretation, it is not enough to be excepted from protection that a position may advance or obstruct public policy or political objectives by means of the control of agency administration, if responsibilities characterized as "technical and professional" are involved. Officials must be "proconsuls" for agency heads or their areas must be "microcosm[s] of the larger agency", App. A7, if the exception is to apply. The First Circuit's view that a particular position is excepted if it involves "partisan political interests or concerns" or "government decisionmaking on issues where there is room for *political* disagreement on goals or their implementation", *Jiménez-Fuentes*, App. A40 (Emphasis ours), is thus fundamentally different from the Seventh Circuit's.

Respondent's position, for example, was found by the First Circuit not excepted from protection, although it involves substantial authority in decisionmaking concerning areas essential to her agency's ability to function. But, there can be no doubt that under the Seventh Circuit's test, which is satisfied when a position has substantial impact on decisions concerning government operation, her position would have been found not protected. This conclusion is inescapable if *Tomczak* v. *City of Chicago*, supra, is compared to this case. In *Tomczak*, the plaintiff argued precisely that his admittedly high-ranking administrative position involved "mundane" and "ministerial" tasks concerning the repair and rehabilitation of the water system; tasks which might properly be called more "technical" or "professional" than respondent's functions of agency administration, which provide essential support to all agency operations. The Seventh Circuit in *Tomczak*, however, rejected plaintiff's argument and, in fact, it was because he occupied a high-ranking job in a large and vital city department, which included the administration of a large staff and budget, as does respondent's, which suggested to the Court that he was "in a position where his political affiliation could affect the ability

of a new administration to implement new policies". *Tomczak*, 765 F.2d, at 642. Although the First Circuit in *Jiménez-Fuentes* extensively quoted from *Tomczak*, it failed to apply its rationale in the instant case.

Moreover, Justice Powell's prediction, dissenting in *Branti*, has proved to be correct:

> "The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position. Legislative bodies will not be certain whether they have the final authority to make the delicate line-drawing decisions embodied in the civil service laws. Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action." 445 U.S., at 524.

Numerous decisions of the Courts of Appeals demonstrate this uncertainty. The Court of Appeals for the Third Circuit, for example, has complained that "[g]uidance from the Supreme Court as to when party affiliation may be 'appropriate' is limited to the facts of the *Branti* case and to a few examples offered by Justice Stevens in his *Branti* majority opinion." *Ness* v. *Marshall*, 660 F.2d 517, 520 (3rd Cir. 1981). A Judge of that Court criticized the existing formulation of the doctrine stating, among other things, that: "the various majority opinions in both *Elrod* and *Branti* are not capable of public comprehension." *Loughney* v. *Hickey*, 635 F.2d 1063, 1069 (3rd Cir. 1980) (Aldisert, Judge, concurring). See also *Brown* v. *Trench*, 787 F.2d 167, 169 (3rd Cir. 1986) (stating that "while *Branti* provides us with a 'test' the Supreme Court has not specified the particular factors which indicate that a position falls within the *Branti* test"). The First Circuit, after referring to the "skeletal teachings of *Elrod* and *Branti*" has insisted that "[i]dentifying generic categories of positions where partisan selection and rejection are permissible has, as we have seen, proven to be an elusive and intractable task." *Jiménez-Fuentes*, App, A38, A40. See also *De Abadía* v. *Izquierdo Mora*, 792 F.2d 1187,

1191 (1st Cir. 1986) (stating that the *Branti* test "is much easier to say than to apply to the wide number of factual situations bound to occur in any government employing a large number of individuals").

The Seventh Circuit, in a post-*Branti* decision has recalled "Justice Powell's admonition in *Elrod* that formulating standards for some patronage practices may be difficult." *Shakman* v. *Democratic Organization of Cook County*, 722 F.2d 1307, 1310 (7th Cir. 1983). Disagreements have been found even as to positions where the plaintiff did not argue the question of the exception on appeal: See *Grossart* v. *Dinaso*, 758 F.2d 1221 (7th Cir. 1985), where two judges implied that under certain circumstances the plaintiff, essentially a financial clerk light-years removed from a position like respondent's, could under certain circumstances be excepted, id., at 1227, n. 3, while another "would have thought [her] either a policymaking ... or a confidential employee, or both, who could be fired for her politics", *id*, at 1235 (Posner, Judge, dissenting). Further, that Court has described the problems faced by the Courts in applying the doctrine as "increasingly intractable" because "not only do job classifications and personalities vary in each case, but also there are substantial differences between governmental bodies and between individual departments or units within a given governmental body". *Meeks* v. *Grimes*, 779 F.2d 417, 419 (7th Cir. 1985).

And the Fifth Circuit, referring to *Elrod*'s exception to the prohibition of encroachment on employee's rights, expressed its view that: "[W]hen it came to stating the terms upon which such encroachments would be condoned ... its language was such that the reader might have been pardoned for concluding that he stood in the presence of a creature more rare even than the ordinary, garden-variety, compelling state interest." *McBee* v. *Jim Hogg County*, 730 F.2d 1009, 1011 (5th Cir. 1984). The lack of adequate guidelines even required the Seventh and Eighth Circuits to consider if such low level employees as court bailiffs and road-graders are excepted from protection under "small office" and "alter ego" theories of exception that to some may comply with the political-affiliation-as-an-appropriate-requirement test. *Meeks* v. *Grimes*, supra (remanding for further findings); *Horton* v. *Taylor*, 767 F.2d 471 (8th Cir. 1985).

Decisions of the District Courts also illustrate the confusion surrounding the *Elrod-Branti* standard. See *Gannon* v. *Daley*, 561

F.Supp 1377, 1383 (N.D. Ill. 1983) (referring to the "vagueness of the Branti standard"); *Ecker* v. *Cohalan*, 542 F.Supp. 896, 901 (1982) (stating, after *Branti*, that there is "no simple standard for determining what positions in local government may be legitimately staffed on a partisan basis"); *Visser* v. *Magnarelli*, 530 F.Supp. 1165, 1173 (N.D.N.Y. 1982) ("because *Branti* formulated its test in such nebulous language..."); *Brunton* v. *United States*, 518 F.Supp. 223, 238 (S.D. Ohio, E.D. 1981) (referring to "the standard's ambiguity, breadth, and difficult application"); and *Garreto* v. *Cooperman*, 510 F.Supp. 816, 819 (S.D.N.Y. 1981) (holding *Branti* standard to be dictum).

Finally, decisions by the Fourth and Fifth Circuits even differ on the question of the kind of situations to which the *Elrod-Branti* doctrine is applicable. In *Jones* v. *Dodson*, 727 F.2d 1329 (4th Cir. 1984), the Court effectively held that the doctrine is applicable only in situations where party affiliation alone is the cause of discrimination. 727 F.2d, at 1336. If any "overt speech activity" whatsoever is involved, the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) would be applicable. 727 F.2d, at 1335 n. 6. Under this reasoning, the First Circuit's decision in *Jiménez-Fuentes* would not have been possible under the test of *Elrod* and *Branti*, since the plaintiffs therein were found to be active political participants in the electoral campaign that eventually led to their dismissal. App. A35 and n. 2. The Fifth Circuit, on the other hand, in *McBee* v. *Jim Hogg County*, 730 F.2d 1009 (5th Cir. 1984), has recently put together the differing tests set forth in *Pickering* and *Elrod* into just one ad hoc balancing inquiry which the Court considers necessary in view of this Court's decision in *Connick* v. *Myers*, 461 U.S. 138 (1983).

In short, confusion and frustration among the courts, unquestionably affecting also government decisionmakers and other concerned parties,[12] characterize the aftermath of *Branti* in this critical area of

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[12] A substantial body of commentary also shows the prevailing confusion. See, for example, Holloway, W. and Leech, M. J., *Employment Termination-Rights and Remedies*, B.N.A. 1985, p. 181 (arguing that the *Branti* test "is less precise than the test proferred by the *Elrod* court", because "[n]o guidelines were suggested for making the determination"); Note, *Politics and the Non-Civil Service Employee: A Categorical Approach to First Amendment Protection*, 85 Columbia L. Rev. 558, 565 (1985) (the "contrasting approaches [of two Fourth and Fifth Circuits decisions]

the law. The First Circuit's decision in this case, finding a top-ranked policymaking government official, substantially involved also in confidential and spokesperson duties, within the general rule of the *Elrod-Branti* doctrine, on the basis of the Court's characterization of her duties of agency administration as "technical and professional", now aggravates the quagmire in which the doctrine already found itself.

The root and the cause of these widespread problems of interpretation and application of the doctrine by federal courts is the absence of guidelines in *Branti* to determine when a particular position may be considered political. The *Branti* standard that a position is excepted from protection "when party affiliation is an appropriate requirement for the effective performance of the public office involved", 445 U.S., at 518, is excessively broad and general to allow the courts, agency heads and other concerned parties, like individuals asked to accept or leave government jobs, to identify an excepted position with reasonable certainty. Imprecision, vagueness, unspecificity, and ambiguity, are in the opinion of most courts, as shown before, the concepts best defining the *Branti* test.

The decision in the instant case, in the context of judicial doubt and confusion described above only reinforces the need for this Court's intervention to clarify a rule on whose importance one may not insist too much. That substantial body of judicial decisions after *Branti* demonstrates that this Court must establish subordinate criteria to its general formulation or substandards that will allow lower courts to apply both the general rule and the exception to

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suggest that there is considerable conceptual confusion in this area of First Amendment doctrine"); Note, *Consideration of Administrative Loyalty in Identifying Positions Exempt from the Shakman Decree*, 17 Loyola University Law Review 119, 144 (1985) ("The subsequent refinements of the *Elrod* test have produced an uncertainty which invites inconsistent application and precludes the establishment of guidelines which might assist employers and employees prior to litigation"); Note, *First Amendment Limitations on Patronage Employment Practices*, 49 University of Chicago Law Review 181, 188, n. 47 (1982) (the *Branti* illustrations "provide little guidance to lower courts charged with implementing the new standard"); Note, *Constitutional Limitations of Patronage Practice: Branti v. Finkel*, 42 Louisiana Law Review 310, 319 (1981) ("One may question whether the Court succeeded in setting forth a less vague and uncertain test or merely exchanged one uncertain test for another").

effectively balance and accommodate the conflicting interests involved in each decision. For example, a public official's rights to political belief must be protected but, what factors in his background of political or government activity, like substantial identification with a previous program or administration, may be taken into consideration to afford or deny First Amendment protection at the time of a particular employment decision? Further, excepted positions must be identified according to the purpose of the exception but, what factors determine the extent to which an official must be able to obstruct government policy in order to be excepted? In sum, comprehensive criteria for determining when a position is political must be established to make possible that determination. Relative weights must be awarded to each factor to determine their comparative importance. These subordinate standards will undoubtedly help to minimize the difficulties encountered by the lower courts in the interpretation and application of the *Elrod-Branti* doctrine.

This is not an easy task. The difficulty "is the natural product of the fact that, not only do job classifications and personalities vary in each case, but also there are substantial differences between governmental bodies and between individual departments and units within a given governmental body". *Meeks* v. *Grimes*, 779 F.2d, at 419. The fact that each decision involves "a rough balance between governmental efficiency, political reality and individual liberty" makes the selection of criteria only more difficult. Thus, the difficulties of establishing more precise standards may not be minimized.

In fact, given the extraordinary number of fundamentally different situations, a reasonable definition of factors for general application to all cases might not be possible. As happened in *García* v. *San Antonio Metro. Transit Authority*, 105 S.Ct. 1005 (1985), with the standard of "traditional governmental functions" the conclusion could be that the standard is unworkable. As in *García*, examples were supplied with the standard examined here, but a general explanation of how to arrive at the fundamental decision was lacking, 105 S.Ct., at 1007. The same as there, here it is "difficult, if not impossible, to identify an organizing principle that places ... cases ... on one side of a line and ... cases ... on the other side". *Id.*, at 1011. Although "it normally might be fair to venture the assumption that case by case development would lead to a workable standard",

id., at 1012, the experience with the *Elrod-Branti* doctrine over a substantial number of years has been absolutely unsatisfactory. If the present standard may not be reasonably made suitable for future application to the myriad of conceivable possibilities, it would be appropriate to reconsider the standard itself and either discard it completely or substitute it for another, more amenable to coherent application.

CONCLUSION

The decision of the Court of Appeals in this case completely frustrates the purpose of the exception to First Amendment protection in employment for public officials. If allowed to stand, it will afford protection to a substantial number of powerful public employees who may obstruct the policies of a new administration. Moreover, the Court's decision adds to the already existing confusion among federal courts in the interpretation and application of the *Elrod-Branti* doctrine. This Court's intervention is required, not only to correct the rule adopted in this and its companion case for the First Circuit, but to clarify, or reconsider altogether, *Branti*'s reformulation of the standard first established in *Elrod*.

Respectfully submitted,

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